

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DOLORES FRANK)	
Claimant)	
)	
VS.)	
)	
BLUE TOP BAR)	
Respondent)	Docket No. 261,509
)	
AND)	
)	
UNKNOWN)	
Insurance Carrier)	
)	
AND/OR)	
)	
WORKERS' COMPENSATION FUND)	

ORDER

Claimant appealed Administrative Law Judge Jon L. Frobish's Order dated February 1, 2001. The Board heard oral argument on August 15, 2001, by teleconference.

ISSUES

Following a preliminary hearing, the Administrative Law Judge concluded the parties were not covered by the Workers Compensation Act because the respondent did not have the requisite gross annual payroll of more than \$20,000.

The claimant requested review of the decision and raised the issue of whether respondent is subject to the provisions of the Workers Compensation Act. Claimant contends that respondent did have a gross annual payroll for all employees that exceeded \$20,000.

Conversely, the Workers Compensation Fund contends the evidence supports the Administrative Law Judge's determination that respondent did not have a sufficient payroll to be subject to the provisions of the Workers Compensation Act.

FINDINGS OF FACT

Having reviewed the entire evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The Blue Top Bar in Cherryvale, Kansas has been operated by different individuals over the course of time. Cherryvale's city records indicate on the date of claimant's accidental injury the beer license for the bar was held by Edna McDowell. However, the bar was operated by Steve Queen and his wife, Lily Queen, on the date of claimant's accident.

Both the Queens and McDowell deny the relationship of employer and employee existed with claimant on the date of accident and they further deny that they had a sufficient payroll that would subject them to the provisions of the Act.

The claimant testified that she started working for Blue Top Bar in November 2000 and that Steve and Lily Queen were her employers. She testified that she was to be paid \$6 an hour but was actually only paid \$5 an hour in cash. She further testified she was working 46 to 49 hours every week. She testified that she had been paid \$310 in cash for two weeks work. Claimant testified that there were four other employees of the bar named Sherry, Trina, Smitty and Louise.

Claimant testified that she injured herself at work on November 20, 2000, when she tripped over a cord and fell on her left knee. An EMT checked her knee and advised her to get x-rays because he thought it was broken. Claimant sought treatment at the Cherryvale Rural Health Clinic and x-rays were taken. It was determined there was no fracture, but Dr. Shakil recommended a brace until further treatment.

The claimant alleged the bar was open 90 hours a week and if all the employees of the bar were paid \$5 an hour that would calculate to a weekly payroll of \$450 a week. Such a weekly payroll paid for 52 weeks would result in an annual payroll of \$23,400. However, the claimant admitted she does not have any deposit records or documentation to verify what she was paid.

Ms. Edna McDowell testified that she took over the bar in August 1999 and that she ran the bar herself, had no payroll, and was only relieved 2 or 3 hours at a time by a volunteer. She further testified that she does not have anything to do with the day-to-day operations since Steve and Lily Queen took over operation of the bar on October 18, 2000. She further testified that she left her beer license in her name until the Queens applied for and received their own license.

Mr. Steve Queen testified that he operated the Queens Family Restaurant in Cherryvale, Kansas and began running the Blue Top Bar on October 18, 2000. Mr. Queen testified that he had one paid employee, Sherry Spencer, and she was paid \$100 a week.

Mr. Queen testified that Louise Moreland, Trina Nance and claimant were all volunteer workers at the Blue Top Bar. He noted the only compensation the volunteers received would be tips from customers. Mr. Queen testified that he did not pay claimant any money in cash but acknowledged he gave claimant and her children free food at his restaurant.

Mrs. Lily Queen kept the books and prepared the work schedules for the bar. She testified that all of the people who worked at the Blue Top Bar were volunteers except Sherry Spencer. She identified Smitty as a slightly retarded man who did janitorial work at the bar in exchange for beer. She noted the bar was open from 9 a.m. to 11 p.m. unless there were patrons still in the bar and then it would close at midnight. Mrs. Queen concluded that they did not anticipate having a payroll of \$20,000 in a year for both the bar and the restaurant.

Ms. Tonya Beechem testified that she had operated the bar in the past. She testified that she takes care of Smitty's finances because he is mildly retarded. She testified that she doesn't give Smitty money for beer so he volunteers his time cleaning at the bar in return for beer. She further testified that in a small town people volunteer just to have something to do.

CONCLUSIONS OF LAW

K.S.A. 44-505(a) exempts from application of the Kansas Workers Compensation Act the following:

(2) any employment . . . wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection; . . .

The record in this case does not indicate that respondents, Steve and Lily Queen, operators of the Blue Top Bar, had an annual payroll of more than \$20,000 for the preceding calendar year. Nor does the evidence establish that they had a payroll of greater than \$20,000 for the current year. Claimant contends that the respondent should have reasonably estimated that their payroll would have been greater than \$20,000 for the current year based on the assumption that all the workers at the bar were compensated at \$5 an hour.

The evidence on the issue of the compensation received by workers at the bar was controverted. Claimant alleges she was paid \$310 for two weeks work but should have

received \$390. The operators of the bar denied paying claimant any cash and noted claimant was a volunteer who worked for tips and was provided free meals at their restaurant. The operators of the bar further contended that except for one employee all of the workers at the bar were volunteers.

Both Edna McDowell and Tonya Beechem supported the Queens' contention that volunteers would assist at the bar. Moreover, the testimony that Smitty was not paid for his janitorial services at the bar was confirmed by Tonya Beechem.

The Administrative Law Judge had the opportunity to evaluate all of the witnesses' credibility as all witnesses testified in person at the preliminary hearing. In circumstances such as this, where conflicting evidence provides more than one possible answer, the Board finds it is appropriate to give some deference to the Administrative Law Judge's conclusions.

The Administrative Law Judge stated he did not completely accept either claimant's or respondent's testimony. Nonetheless, the Judge concluded that, at best, the claimant would have expected to earn no more than the \$100 a week which was the salary the only other employee of the bar received. Combining those salaries would not exceed a \$20,000 total gross annual payroll for the bar. Even if the claimant's testimony is accepted that she earned \$390 for two weeks worked, that would calculate to an annual salary of \$10,140. Adding that amount with the annual salary of the only other employee, this would still not exceed \$20,000.

The Board, therefore, finds that respondent's total gross annual payroll could not reasonably have been estimated to exceed \$20,000 for the current year. The Administrative Law Judge's Order is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the preliminary hearing Order of Administrative Law Judge Jon L. Frobish dated February 1, 2001, is affirmed.

IT IS SO ORDERED.

Dated this 31st day of August 2001.

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Edwin Bideau III, Attorney for the Workers' Compensation Fund
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director